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No. 90-133

In The

Supreme Court of the United States

October Term, 1990

BERNARD A. SCHWARTZ, et al., and
THE BOARD OF COUNTY COMMISSIONERS
OF CARROLL COUNTY, MARYLAND,

Petitioners,

v.

ROBERT E. HARRISON, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Were conditions relating to the abatement of aircraft noise during flight operations imposed by the Carroll County Maryland Board of Zoning Appeals in granting a conditional use for a privately owned airport properly found invalid because of the preemption by federal regulation by the Court of Appeals of Maryland applying the ruling by this Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)?

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CONSTITUTIONAL PROVISIONS INVOLVED

The following provision of the Maryland Constitution, Declaration of Rights, is incorporated in Respondents' argument in addition to other provisions and references in the Petition for Writ of Certiorari:

> The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State, and all People of this State, are, and shall be bound thereby; anything in the Constitution

or Law of this State to the contrary notwithstanding.

MD. CONST., DECLARATION OF RIGHTS, art. 2

REASONS FOR DENYING THE WRIT

I.

THE CONDITIONS FOUND INVALID BY THE COURT OF APPEALS OF MARYLAND ARE WITHIN THE CLASS OF LOCAL POLICE POWER REGULATIONS WHICH THIS COURT FOUND IMPLIEDLY PREEMPTED BY FEDERAL REGULATION IN *CITY OF BURBANK v. LOCKHEED AIR TERMINAL, INC.*

This Court has ruled that police power regulations of aircraft engine noise by local government are invalid because this area of regulation is impliedly preempted by "the pervasive nature of the scheme of federal regulation of aircraft noise" under the Federal Aviation Act of 1958; 72 Stat. 731, 49 U.S.C. Sect. 1301, *et seq.*, as amended by the Noise Control Act of 1972; 86 Stat. 1234, 49 U.S.C. 1431, *et seq.; City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 at 633 (1973).

City of Burbank involved a "curfew" adopted by the City Council of Burbank, California, pursuant to its police powers prohibiting pure jet aircraft take-offs from Hollywood-Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m. every day of the week. The airport was privately owned and operated. The municipality enacting the curfew ordinance was not the airport's proprietor.

After reviewing the extensive noise abatement authority of the Administrator of the FAA and legislative

history of the amendments to the Federal Aviation Act of 1958 by the Noise Control Act of 1972, this Court concluded that while noise control is "deep seated in the police power of the States . . . the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls." *City of Burbank*, 411 U.S. at 638.

This Court found the Federal Aviation Act vested the federal government with " 'complete and exclusive national sovereignty in the airspace of the United States' ", 411 U.S. at 626-627, and pursuant to such sovereignty, the FAA had "broad authority to regulate the use of the navigable airspace, 'in order to insure the safety of aircraft and the efficient utilization of such airspace' . . . and 'for the protection of persons and property on the ground' ", 411 U.S. at 627.

This Court found that the FAA, in the interest of its exclusive management of navigable airspace, had consistently opposed curfews, 411 U.S. at 628, and balancing considerations of efficiency, safety and other factors mentioned in the Federal Aviation Act for development of FAA noise regulation, "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. at 639.

City of Burbank, provides no exceptions for non-jet aircraft, small privately owned airports (such as Respondents), or flights not affiliated with commercial air carriers. The only exception for local regulations of aircraft

engine noise discussed in *City of Burbank* was for regulations imposed by a municipality or other government as proprietor, 411 U.S. at 635-636 n.14.

The two conditions of Respondents' conditional use approval which the Court of Appeals of Maryland found invalid pursuant to *City of Burbank* fall within the category of local regulations preempted by federal law.

The decision of the Carroll County Board of Zoning Appeals of May 11, 1984 (App.) discusses two primary concerns about operation of an airport by Respondents; safety, and, the impact of aircraft noise on neighboring property owners. The Board's Decision declined to address safety concerns concluding that they would be more appropriately addressed by the Aviation Administration of Maryland. The conditions imposed by the Board were obviously addressed to the remaining concern of aircraft noise.

Respondents' airport is privately owned and Carroll County has no proprietary interest in it. The Board's authority to impose conditions on approvals of conditional uses is generally derived from the delegation to Carroll County of the State's police power to zone. (See *Joy v. Anne Arundel County*, 52 Md. App. 653, 451 A.2d 1237 (1982)). Condition 2 provides:

> (2) *Aircraft take-off* shall be separated by intervals of at least fifteen minutes in order to minimize the adverse effects of *aircraft engine noise* upon the residents of the surrounding area and to reduce the intensification of the use of the property in what is otherwise a primarily rural residential area. (emphasis supplied)

By its express language, condition 2 is intended to regulate aircraft engine noise emissions, and as a non-proprietary, police power measure, is clearly within the class of local regulations preempted by this Court's holding in *City of Burbank*.

Condition 3 provides:

> (3) *Aircraft take-off* shall not be made before 9:00 a.m. or later than 7:00 p.m. on any day. (emphasis supplied)

The language of condition 3 refers to aircraft operations (take-offs) and is in all pertinent respects identical to the curfew which this Court found preempted in *City of Burbank*.

The Court of Appeals of Maryland in *Harrison v. Schwartz*, 319 Md. 360, 572 A.2d 528 (1990) committed no error in finding these two conditions invalid on the ground of federal preemption pursuant to *City of Burbank*.

Petitioners have argued that the Court of Appeals' interpretation of *City of Burbank*, was erroneous, due in part to "enormous factual differences between the Hollywood-Burbank commercial jet airport and the rural Woodbine grass airstrip." (Petition for Writ of Certiorari, p. 6).

The Court of Appeals correctly determined that these differences were inapposite. "There are distinctions, but they make no constitutional difference." *Harrison*, 319 Md. at 368, 572 A.2d at 532.

The factual distinctions asserted by Petitioners are first, the difference in size and character of air operations conducted at Hollywood-Burbank Airport as opposed to

activities at Respondents' Woodbine facility and, secondly, the extent of FAA regulation and on-site involvement at Hollywood-Burbank Airport compared to Respondents' facility. Petitioners argue that these distinctions compel a different conclusion than that reached by the Court of Appeals of Maryland as to the appropriate scope of the preemption rulings in *City of Burbank*.

These distinctions are immaterial to the scope of that preemption. The distinctions are between the two airports, not the type or nature of the regulations at issue. *City of Burbank* does not prohibit all local police power regulation of airports, only local police power regulation of *aircraft* engine noise emissions. See, *Air Transport Assoc. of America v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975). The Board's Decision and express language of Conditions 2 and 3 indicate that they are regulations affecting *aircraft engine noise* occurring during flight operations.

Among the "enormous factual differences" asserted by Petitioners is that the Hollywood-Burbank Airport was a metropolitan airport, serving jet aircraft of certified commercial air carriers handling passenger and cargo activities involved in interstate and international flights whereas the Woodbine site was a much smaller, rural facility serving smaller powered and non-powered (glider) aircraft.[1]

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[1] The Court of Appeals correctly noted that the record indicated Respondents were in fact involved in a commercial operation, *Harrison v. Schwartz*, 319 Md. at 368, 572 A.2d at 532.

Petitioners raised these same arguments in the Court of Appeals, and the arguments were specifically considered and addressed in that Court's opinion.

> Obviously, the small Woodbine Airport is very different from Hollywood-Burbank. Both, however, are privately owned. . . . The Supreme Court did not make an exception for small airports that do not involve inter-airport commercial cargo or passenger flights, or for activities not expressly governed by federal statute or regulation. 319 Md. at 368-369, 572 A.2d at 532

Neither Carroll County nor any of its Boards or administrative bodies are the proprietors of the Respondents' Woodbine airport site. Petitioners have been unable to identify any language in the majority opinion of *City of Burbank* creating an exception based on the distinctions asserted. The Court of Appeals, correctly found that no such exceptions exist. *Harrison*, 319 Md. at 368, 572 A.2d at 532. The United States Court of Appeals for the Eleventh Circuit stated in *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983); "*Burbank* allowed for one possible exception to this rule in situations where a City is the proprietor of the airport" 711 F.2d at 1009. Petitioners cannot avail themselves of this singular exception.

The irrelevance of these alleged enormous factual distinctions upon the scope of *City of Burbank* preemption is further demonstrated by decisions of the federal courts, in which local police power regulation of aircraft engine noise emissions were invalidated under *City of Burbank*, even though those regulations were designed to operate at other relatively small airport facilities more akin to Respondent's site than the Hollywood-Burbank Airport. See *United States v. City of Blue Ash*, 487 F. Supp. 135 (S.D.

Ohio, W.D. 1978), aff'd mem. 621 F. 2d 227 (6th Cir. 1980) and *Blue Sky Entertainment, Inc. v. Town of Gardiner*, 711 F. Supp. 678 (N.D.N.Y. 1989).

Petitioners' distinctions in the scope of FAA on-site involvement in *airport* activities between Hollywood-Burbank Airport and Respondents' site is likewise irrelevant to the scope of preemption pursuant to *City of Burbank*. Federal preemption was not limited to the particular facts in *City of Burbank*, or to other large, major, urban, airports, serving certified commercial air carriers, nor was there any threshold amount of FAA on-site activity required before such preemption could be invoked.

The assertion that activities at the Woodbine site are free from FAA regulation is erroneous and was repudiated by the Court of Appeals, *Harrison*, 319 Md. at 368, 572 A.2d at 532.

Petitioners argue that Conditions 2 and 3 are land use regulations of an airport and are therefore not within the preemption announced in *City of Burbank*. This assertion fails to portray honestly the subject matter of those conditions. The express purpose of Condition 3 is to reduce "aircraft engine noise". Likewise, Condition 2, a curfew identical in all pertinent respects to that struck down in *City of Burbank*, is specifically designed to abate "aircraft noise".

Petitioners argue also that the enactment by Congress of the Aviation Safety and Noise Abatement Act of 1979; 101 Stat. 1489, 1523, 49 U.S.C. Sections 2101, *et seq.* and the Airport and Airway Improvement Act of 1982; 101 Stat 1487-1507, 49 U.S.C. Sections 2201, *et seq.*, are post

City of Burbank Congressional enactments which ameliorate *City of Burbank*'s holding by demonstrating a less preemptive Congressional intent.

Neither of the congressional enactments mentioned concern police power regulation of *aircraft engine noise* by state or local governments. They concern land use planning considerations and guidelines to encourage a cooperative effort between federal, state and local governments in planning and implementing residential and other forms of development around airports and air traffic centers serving certified air carriers.

Since the subject matter of these enactments is completely different than the subject matter of the regulations invalidated by *City of Burbank*, neither of these post *City of Burbank* acts can arguably be evidence of congressional intent to ameliorate in any way the preemption of local, nonproprietary, police power regulation of aircraft engine noise emissions.

In *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981) the California Department of Transportation argued that the same post *City of Burbank* congressional enactments mentioned by Petitioners (and additional enactments) demonstrated a congressional intent to dilute the scope of *City of Burbank* preemption. In footnote 15 of their opinion the Ninth Circuit Court of Appeals reached a completely different conclusion from the legislative history.

> We note that other congressional acts subsequent to *City of Burbank* indicate a continuing intent to preclude local regulation. For example, the Aviation Safety and Noise Abatement Act of 1979. . . . These acts are some indication that

> Congress has not changed its collective mind regarding the wisdom of forbidding local regulation of the sources of aircraft noise. Indeed, the Aviation Safety and Noise Abatement Act of 1979 may indicate exactly the opposite. 651 F.2d at 1313 n. 15.

Petitioners raised the same argument in the Court of Appeals below. In disposing of that argument the Court of Appeals declared:

> What this language deals with is not local control of aircraft noise but local zoning to keep residential and other incompatible activities away from airports (citations deleted) . . . . Review of post – *City of Burbank* federal airway legislation and the numerous regulations adopted pursuant thereto shows that the federal presence in the field has become even more pervasive than it was in 1973. No court has agreed with the Neighbors that this legislation has tended to ameliorate the holding of *City of Burbank*. See, e.g., *San Diego Unified Port District*, 651 F.2d at 1313 n. 15 (Acts subsequent to *City of Burbank* manifest Congress's continuing intent to preempt local regulation). *Harrison*, 319 Md. at 374 n.6, 572 A.2d at 535 n.6.

Petitioner cites post *City of Burbank* decisions of this Court and other Courts in which federal regulation of certain activities or industries was determined not preemptive to bolster their argument that the mere presence of federal regulation does not completely divest state or local governments of authority to regulate any aspect of those activities. However, none of those cases concern local, non-proprietary, police power regulation of aircraft engine noise emissions which were specifically found preempted in *City of Burbank*. The fact that federal regulation of certain industries, or even certain aspects of the

aviation industry have been ruled non-preemptive under specified circumstances does nothing to affect the clear holding of this Court in *City of Burbank* which invalidated local regulations of the nature set forth as Conditions 2 and 3 in the Board of Zoning Appeals' May 11, 1984 Decision.

The Court of Appeals of Maryland properly invalidated Conditions 2 and 3 pursuant to *City of Burbank*.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS OF MARYLAND AND DECISIONS OF FEDERAL CIRCUIT OR DISTRICT COURTS OR COURTS OF OTHER STATES.

Petitioners have begun their argument of alleged conflict between the Court of Appeals' holding and post *City of Burbank* decisions of other federal and state courts by discussing the *City of Burbank* "proprietor" exception, and an observation in the dissenting opinion by now Chief Justice Rehnquist regarding the perceived ability of a local government to exercise police power to deny airport permits solely because of noise considerations despite the majority's holding of preemption. Neither of these principles helps Petitioners.

Carroll County is not the proprietor of the Respondent's site. The subject matter of Conditions 2 and 3 is not an *airport*; the subject matter is *aircraft engine noise*.

Petitioners argue that courts have traditionally been cautious of precluding state and local governments from regulating land use for aviation purposes. However, none

of the cited cases has ruled that these land use methods can be utilized to regulate aircraft engine noise.

Conditions 2 and 3 are not "land use" regulations but are local police power attempts to restrict or regulate aircraft engine noise. Had the Carroll County Board of Zoning Appeals imposed legitimate land use conditions on the operation of Respondents' facility such as those upheld in *Faux-Burhans v. County Commissioners of Frederick County*, 674 F. Supp. 1172 (D.Md. 1987), aff'd, 859 F.2d 149 (4th Cir. 1988) cert. denied ___ U.S. ___, 109 S. Ct. 869 (1989) instead of regulation of aircraft engine noise, *City of Burbank* preemption may not have been applicable.

The federal and state court decisions cited by Petitioners do nothing to undermine the Court of Appeals' decision in *Harrison v. Schwartz*. Many of these same cases were raised in briefs and arguments by Petitioner in the Court of Appeals and rejected. The cases cited by Petitioners in support of their "conflict" argument, actually tend to support the finding of preemption of Conditions 2 and 3.

As the Court of Appeals observed:

> The reach of *City of Burbank's* preemption holding is also confirmed by what appears to be almost uniform interpretation by other Courts. Indeed, we have been unable to discover a case (other than the opinion of the Court of Special Appeals) that squarely supports the position of the Neighbors and the County. 319 Md. at 370, 572 A.2d at 533.

Certain of the cases cited by Petitioners recognize the *"proprietor"* exception for local regulations, which was reserved by the majority opinion in *City of Burbank*. See,

National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976); *Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981).

Other of Petitioners' cited cases deal with a local government's ability to *prohibit* airports or heliports, *Garden State Farm, Inc. v. Bay*, 77 N.J. 439, 390 A.2d 1177 (1978); *Wright v. County of Winnebago*, 73 Ill. App. 3d 337, 29 Ill. Dec. 347, 391 N.E. 2d 772 (1979); with the recognition of a private cause of action for damages against a proprietor for *nuisance* as a result of noise, *Wood v. City of Huntsville*, 384 So. 2d 1081 (Ala. 1980); *Greater Westchester Home Owners Association, et al. v. City of Los Angeles*, 160 Cal. Rptr. 733, 603 P. 2d 1329 (1979); *Bieneman v. City of Chicago*, 864 F. 2d 463 (7th Cir. 1988); *Krueger v. Mitchell*, 112 Wis. 2d 88, 332 N.W. 2d 733 (1983); and, regulations or conditions which affect matters other than aircraft engine noise emissions; *Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157, 360 N.E. 2d 1051 (1977); and *Faux-Burhans v. Board of County Commissioners of Frederick County*, supra.

Conditions 2 and 3 are not proprietary, but police power regulations and are not prohibitions of a land use permit. This case does not involve a private action to recover damages for nuisance. As the Court of Appeals correctly noted, "the County is seeking to use its 'police powers to control noise by regulating the flight of planes' ". *Harrison*, 319 Md. at 373, 572 A.2d at 534, (quoting *Wood v. City of Huntsville*, 384 So. 2d at 1085).

The Court of Appeals' decision is also consistent with pre *City of Burbank* recognition of federal preemption of local aircraft noise "curfew" regulations. See, *American*

Airlines, Inc. v. Town of Hempstead, 398 F. 2d 369 (2nd Cir. 1968).

The *City of Burbank* majority opinion quoted portions of a letter from the Secretary of Transportation to Congress in connection with the proposed 1972 amendments to the Federal Aviation Act of 1958 addressing the then existing scope of federal preemption of state and local regulation of aircraft noise.

> 'The Courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. . . . H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft'. 411 U.S. at 635.

The Court of Appeals' decision is consistent with both pre and post *City of Burbank* preemption of local aircraft noise regulation.

There is no conflict between the holding of the Court of Appeals of Maryland and the decisions of the federal courts and courts of other states.

III.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND DOES NOTHING TO INTERFERE WITH THE RELATIONSHIP BETWEEN THE FEDERAL AND NONFEDERAL GOVERNMENTS IN CONNECTION WITH REGULATION OF AIRPORTS AND AVIATION FACILITIES.

Petitioners' argument that the logical extension of the Court of Appeals' holding will leave nonfederal governments powerless to regulate airports through zoning and land use methods misstates the Court of Appeals' decision and implicitly, at least, mischaracterizes the nature of the stricken conditions.

Conditions 2 and 3 are local police power regulations of aircraft engine noise and the fact that they were imposed by the Carroll County Board of Zoning Appeals does not make them regulations of land use.

These Conditions, by their express terms, were not intended to regulate activities on the ground but aircraft operations. Had the stricken conditions been legitimate land use restrictions, such as those involved in *Faux-Burhans v. County Commissioners of Frederick County*, supra, (i.e.; number of aircraft, take-off distance required, set-back requirements, etc.) instead of preempted noise abatement restrictions, Petitioners' argument may be on a better foundation.

There is absolutely no interference with the traditional federal deference accorded local governments in the land use sphere as a result of the Court of Appeals' finding Conditions 2 and 3 preempted as local, nonproprietary noise regulations. Make no mistake, this case is not about the validity of legitimate *land use* regulations.

The Court of Appeals' decision does not undermine the authority of a zoning body to impose conditions upon grants of land use permits. All that the Court of Appeals decided was that these conditions (arguably legitimate in other respects) encroached upon a preempted area. "Once the field is occupied by the federal government, neither state nor local government may enter it." *Harrison*, 319 Md. at 369, 572 A.2d at 532.

The Court of Appeals' decision does not emasculate local governments from regulating aircraft noise as a proprietor of an airport or aviation facility. The Court of Appeals' opinion specifically recognized the existence of such an exception but ruled it unavailable to Carroll County since the local government was not the proprietor of the site. 319 Md. at 369 n.4, 572 A.2d at 532 n.4.

While land use and zoning may be matters of purely local jurisdiction or concern, *City of Burbank* indicates that regulation of aircraft engine noise is not, and local police power incursions into the field are federally preempted. The Court of Appeals did nothing more than apply the literal holding of *City of Burbank* and its decision does nothing to alter the balance between federal and local responsibilities.

IV.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IS SUPPORTABLE AS A MATTER OF STATE LAW AND IS OTHERWISE NOT APPROPRIATE FOR REVIEW BY THIS HONORABLE COURT PURSUANT TO A WRIT OF CERTIORARI.

For the foregoing reasons, there are no special or important considerations of nationwide impact presented

in the Petition for Writ of Certiorari which would justify review of *Harrison v. Schwartz* by this Court.

The majority opinion in *City of Burbank* held that, except for proprietary regulations, local police power regulation of aircraft engine noise is preempted by the "pervasive nature of the scheme of federal regulation of aircraft noise." 411 U.S. at 633. All that the Court of Appeals of Maryland did was apply the literal holding of *City of Burbank* to Conditions 2 and 3 of the Board of Zoning Appeals' May 11, 1984 Decision. These Conditions were not, as Petitioners have attempted to characterize them, local zoning restrictions on the use of land as an airport, but were expressly designed as measures to abate aircraft engine noise. They were accordingly stricken by the Court of Appeals. *Harrison*, 319 Md. at 374-375, 572 A.2d at 535.

Petitioners' arguments demonstrate some disagreement with this Court's opinion in *City of Burbank*, but do not demonstrate that the Court of Appeals improperly applied that holding.

The Court of Appeals' decision also is correct, accurate and supportable as a matter of Maryland law.

The Constitution of Maryland recognizes the supremacy of the U.S. Constitution and federal law, and its binding effect on Maryland courts.

> The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State, and all People of this State, are, and shall be bound thereby; anything in the Constitution

> or Law of this State to the contrary notwithstanding. MD. CONST., DECL. OF RIGHTS, art. 2.

The Court of Appeals of Maryland has held that the above recited mandate includes decisions of this Court construing the U.S. Constitution. *Merrick v. State*, 283 Md. 1, 389 A.2d 328 (1978).

The doctrine of federal preemption, as applied in *City of Burbank*, is based on the Supremacy Clause of the U.S. Constitution (U.S. CONST., Art. VI; Cl. 2). *Hayfield Northern Railroad Co., Inc. v. Chicago & North Western Trans. Co.*, 467 U.S. 622 (1984).

The Court of Appeals of Maryland was obligated by Maryland Constitution, Declaration of Rights; Article 2, to apply the holding of *City of Burbank* to the facts before it, not to go beyond the holding and create an exception to the doctrine of federal preemption based upon the particular facts of this case as Petitioners would have had them do. *Heintz v. Board of Educ. of Howard County*, 213 Md. 340, 131 A.2d 869 (1956); see also *Statom v. Board of County Commissioners of Prince George's County*, 233 Md. 57, 195 A.2d 41 (1963).

In *Heintz*, supra, the Court of Appeals of Maryland recognized the binding effect of decisions of this Court construing federal law and constitutional provisions. In *Heintz*, the appellant contended that prior decisions of this Court construing the 14th Amendment to the U. S. Constitution were wrong and made a spirited argument to prove the same. Judge Henderson of the Court of Appeals wrote that even assuming the correctness of the appellant's argument:

> we are faced with the fact that the Supreme Court of the United States has passed upon Petitioners contentions and found them untenable and unsound. . . . On the contrary we must recognize the binding force of such decisions of the Supreme Court and be controlled by them. 213 Md. at 343, 131 A.2d at 871.

The Court of Appeals was obligated to apply the literal holding of *City of Burbank* to the facts before it as a matter of Maryland law.

The Petition for Writ of Certiorari should be denied.

CONCLUSION

Petitioners have failed to establish a valid argument for the issuance of a Writ of Certiorari to the Court of Appeals of Maryland. For the foregoing reasons, Respondents Robert E. Harrison and Jerry Gaudet, respectfully request this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Case No. 1988

OFFICIAL DECISION
BOARD OF ZONING APPEALS
CARROLL COUNTY, MARYLAND

Applicant: Robert E. Harrison
c/o Dulany & Davis
P.O. Box 525
Westminster, Maryland 21157

and

Gerry Gaudet, President
Bay Soaring, Inc.
c/o David L. Johnson, Esq.
196 Pennsylvania Avenue
Westminster, Maryland 21157

Requests: Approval of a conditional use for an airport and landing field for use by powered and non-powered aircraft in an area zoned agricultural pursuant to Section 6.3 (b) of the Carroll County Zoning Ordinance.

Location: South of Gillis Falls Road and east of John Pickett Road with vehicular access therefrom about 2,600 feet south of Gillis Falls Road intersection in Election District 14.

Bases: Article 17, Section 17.6; Article 6, Section 6.3(b), Carroll County Zoning Ordinance.

Hearing Held: January 18, 1984; Continued February 21, 22, 23, 24 and March 15, 1984.

I

Introduction

This matter involves the application of Robert E. Harrison (Bay Soaring, Inc. was a party to this proceeding and will be referred to with Mr. Harrison collectively as "the Applicant" hereinafter unless the context reflects otherwise.) for a conditional use of a portion of his 175 acre farm as an airport. In 1972 Mr. Harrison had applied for a conditional use of a portion of the farm for a private airport including a parachute drop zone. Since that time there has existed on the property an airfield which is approximately 1650 feet long and 100 feet wide. As the use of the airfield shifted from an occasional weekend use, mostly by parachutists, to an almost daily use by gliders or sailplanes, complaints by neighboring property owners intensified. In a decision by this Board, which has no relevance here, except historical, the Board found that the use of the air strip as a glider port was not the use which it had conditionally approved in 1972. Accordingly, the property owner has applied for conditional use approval of his property as a glider port, which application is the subject of this decision.

The people who protest this application have identified a number of concerns which they forcefully and adeptly raised before this Board. Primarily, the protestants seem concerned about safety issues, and the intensification of the use of the property with its concomitant increase in noise caused by tow-planes.

The Applicant has argued that the use of his property as an airport would not create any adverse effects greater at that location than anywhere else in the agricultural

zone. As a result, he claims that he is entitled to conditional use approval.

II

THE AIRPORT – PUBLIC OR PRIVATE?

The protestants and the Applicant have disputed whether or not the use is a public or private one. Because the State Aviation Administration has classified the airport as "private/commercial", the protestants have argued that it is a public airport and apparently from that fact argue that it should not receive conditional use approval. The applicant stresses the "private" portion of the designation to justify approval as a private airport. As Article 6, Section 6.3(b) of the *Carroll County Zoning Ordinance* allows both public and private airports in the zone, the Board is not required to make this distinction. The Board must decide whether or not the proposed use at the proposed location would have adverse effects other than those which would be caused by the existence of this use in any other part of the Agricultural District. To this extent, the Board must be able to identify from the record what it is the Applicant proposes to do but is not required to identify or distinguish whether or not the use is "public" or "private".

III

CONDITIONAL USE-FINDINGS

A

Description

The proposed location is a portion of a 175 acre farm owned by Robert E. Harrison. This farm is located in the Woodbine area of Carroll County, not far from the proposed Gillis Falls Reservoir. The area is primarily rural, but has experienced some development over the past 10 years. Development is limited by both the agricultural zoning in the area and the acquisition of substantial acreage by the County Commissioners of Carroll County for the construction of the Gillis Falls Reservoir.

The property is located south of Gillis Falls Road and east of John Pickett Road. John Pickett Road in this location is a County maintained dirt road. The site is accessible from John Pickett Road by a farm lane which traverses a meadow. The location is improved by a runway and a building. The building is approximately 15 to 20 feet wide by 50 to 60 feet long. It is located in a Conservation District and was built without benefit of a building permit. The building is used as an office and as a classroom for those people who wish to obtain a license to fly gliders. The facility has no plumbing, it has electric service and it has a two seat privy. The runway is approximately 1650 feet long by 100 feet wide. It runs in a generally north/south direction from a point interior to the property of Robert E. Harrison to a point on the

property line which separate Robert E. Harrison's property from Robert L. Harrison's property. Robert L. Harrison was one of the protestants in this case and has constructed a fence at his property line. The area to the north of the runway is farmed and is cultivated with alfalfa. The area south of the runway, Robert L. Harrison's property, is cultivated in corn.

The proposed location is leased by Robert E. Harrison to Bay Soaring, Inc. of which Gerry Gaudet is the principal. Michael Harrison, Mr. Robert E. Harrison's son, is the manager of the airport. He lives very close by in an area on the property north of the runway. The property owner has indicated that he does not want the property to become an airport where anyone can land or take-off. He wants the airport to be restricted to those who apply for permission to land or take-off through Mr. Gaudet or his son. He feels that he should continue to exercise control over those who lease the airport and those who fly in and out.

The Applicant indicates that parachutists will not be allowed to use the property under the proposed use. The only use will be as a small private (use restricted to those given permission to land or take-off by the airport manager) airport primarily for use by gliders (sailplanes).

Gliders, or sailplanes, are aircraft that are not powered by any mechanical devices. They rely for lift on naturally occurring wind currents and thermal lift sources. They are put into the air in either of two fashions. They may be towed into the air by powered aircraft or they may be placed into the air with a catapult-like device. While Bay Soaring, Inc. has a catapult-like device,

the catapult is not used frequently, if at all. Primarily, the gliders are towed into the air. For this purpose, there are two tow-planes located at the site.

Mr. Gaudet as the principal in Bay Soaring, Inc. keeps a log of all take-offs and landings at the airport. He has indicated that there is an average of 13 flights per day during the course of a year. The heaviest use is on weekends and holidays. The intensification of the use during weekends and holidays is exemplified by Bay Soaring's records for the past year which show that there were 11 days when there were more than 50 flights. Mr. Gaudet's log does not reflect flights that are not associated with Bay Soaring, Inc.

B

Safety

Much testimony and considerable time was spent on the issue of whether or not the proposed use would be safe in this neighborhood. While the Board believes that the protestants are genuinely concerned for their safety and the safety of their families, there was no testimony to indicate that these concerns are any different from the concerns of any property owner living near a similar use in any part of the Agricultural District. The requirement that an airport receive the approval of the State Aviation Commission, Article 6, Section 6.3(b) *Carroll County Zoning Ordinance*, indicates that the County Commissioners felt that safety concerns should be addressed by the agency having authority to control that aspect of an airport, rather than this Board. For if this use is unsafe at

this location, it would be unsafe in any location. It is not the object of the zoning law to prohibit aviation.

C

Impact on Neighborhood

Other than the matter of safety, the issue which reflected the greatest impact on the neighboring property owners was that of noise. The protestants found the noise to be objectionable. During the hearing an attempt was made to introduce evidence concerning decibel levels. Unfortunately, the Board did not have the benefit of an expert to interpret the decibel readings and can not rely upon those readings for its decision. Instead, the Board must rely upon the testimony of the neighbors which is sufficient to show clearly that the proposed use has a substantial impact on them. Complaints concerning noise were voiced both because of its volume and its frequency.

Apparently, the noise of a plane is increased as it struggles to lift both itself and a glider from the ground. This operation may take place every 6 minutes during a busy day. It is sometimes less frequent. The properties that are most affected are those closest to the southend of the airport. This adverse impact is made worse by the location of the runway with relationship to the adjoining properties. Because the runway ends at the Applicant's property line, the flight path of aircraft taking-off to the south is very close to the homes of some of the protestants. In addition, the plane does not achieve an altitude sufficient to reduce the noise on the ground under it by the time it leaves the Applicant's property. In this respect, the proposed use at the proposed location creates an

adverse effect which would not necessarily be present on a larger property or if the runway were buffered by more of the Applicant's land. The Applicant indicated that he could extend the runway 500 feet to the north. If the Applicant were to extend the runway by 500 feet to the north and reduce the runway by 500 feet from the south, the Board believes that the adverse effect created by the proposed use would be reduced and would not likely be any worse at this location than if it were located elsewhere within the zone.

The protestants indicate that they have been adversely affected by people attempting to get to the airport but not knowing where it is located. Obviously, this detrimental effect might not occur if the property were in a different location within the zone. For example, it could be on a better road or a more direct route. However, the Board believes that a sign placed at the entrance to the site is all that is necessary to alleviate these concerns of the protestants.

The protestants noted that the use of this property had interfered with radio and television reception in their homes. There is no evidence in the record to indicate that this adverse effect would be different were the use in a different location within the zone. Accordingly, the Board has no power to reject the application on this basis, nor does the Board have sufficient information to condition its approval in such a way to reduce this adverse impact.

IV

Conditional Approval

In attempting to balance the right of a property owner to use his property as he sees fit against the right of his neighbor to the peaceful and quiet enjoyment of his property, the Board believes that the Applicant is entitled to conditional use approval, but that the use must be conditioned as follows:

1. Within thirty (30) days from the date of this decision, the Applicant must extend the runway 500 feet to the north and reduce the runway 500 feet from the south property line in order to provide greater distance for aircraft to gain altitude before crossing the southern property line and thereby reduce the adverse effect which the noise of aircraft taking-off causes the neighboring properties. Specifically, the runway may not be closer at its southern end to the property line than 500 feet.

2. Aircraft take-offs shall be separated by intervals of at least 15 minutes in order to minimize the adverse effects of aircraft engine noise upon the residents of the surrounding area and to reduce the intensification of the use of the property in what is otherwise a primarily rural residential area.

3. Aircraft take-offs shall not be made before 9:00 a.m. or later than 7:00 p.m. on any day.

4. The operations building which is shown to exist in the "C" Conservation District must be moved to the "A" Agricultural District, and the property owner must apply for and receive a building permit, zoning certificate and use and occupancy permit including site

plan approval before using the building for any purpose from the date of this decision.

5. The Applicant must prepare and submit a site development plan in accordance with the provisions of Article 10, Section 10.4(d) of the Carroll County Zoning Ordinance within One (1) month of the date of this decision; provided that the Board may authorize an extension of one (1) month based upon a written request by the Applicants justifying to the Board's satisfaction such an extension and without necessity for a further hearing.

6. The Applicant must erect a sign at or adjacent to the entrance to the site. The sign should identify the property and the use with sufficient clarity that a reasonable person would be able to find the site if he were looking for it. The area of the sign face shall not be greater than three (3) feet by four (4) feet.

7. The Applicant will design take-off and landing patterns in such a way that they will minimize the adverse effect upon neighboring residents. In addition, the Applicant shall require people taking-off and landing from the airfield. to be familiar with the landing and take-off patterns and to use them.

8. Any failure to comply strictly with the above conditions constitutes a basis for this Board to void the approval granted hereby.

Conclusion

It is the decision of the Board of Zoning Appeals for Carroll County that the conditional use sought by the

Applicant is approved subject to the above stated conditions and for the use described herein. The decision to grant the conditional use approval is made by the majority of the Board, Mr. Totura being opposed and Mr. Selby and Chairman Raver being in favor. Upon the decision to grant conditional use approval having been made, it was the unanimous decision of the Board to impose upon the use the conditions set forth herein.

May 11, 1984
Date:

/s/ Woodrow T. Raver,
Woodrow T. Raver, Chairman